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IN THE

Supreme Court of the United States

OCTOBER TERM, 1989

STATE OF MARYLAND,

Petitioner,

v.

SANDRA ANN CRAIG,

Respondent.

BRIEF FOR THE NATIONAL ASSOCIATION OF CRIMINAL DEFENSE LAWYERS AS *AMICUS CURIAE* SUPPORTING RESPONDENT

MARIA CRISTINA GUTIERREZ, ESQ.
(Counsel of Record)
1007 No. Calvert Street
Baltimore, Maryland 21202
(301) 539-6500

ANNABELLE WHITING HALL
(Counsel for Amicus Curiae)
440 Hill Street
Reno, Nevada 89501
(702) 329-6770

For Amicus Curiae
National Association of
Criminal Defense Lawyers

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STATEMENT OF INTEREST OF THE AMICUS CURIAE

The National Association of Criminal Defense Lawyers, Inc. ("NACDL") is a District of Columbia non-profit corporation with a membership of more than 5,000 lawyers throughout the 50 states. The NACDL was founded over 25 years ago to promote study and research in the field of criminal defense law, to disseminate and advance the knowledge of the law in the field of criminal defense practice and to encourage the integrity, independence and expertise of criminal defense lawyers.

Among the NACDL's objectives is the promotion of the proper and constitutional administration of criminal justice. Consequently, the NACDL concerns itself with the protection of individual rights and the improvement of criminal law, its practices

and procedures. A cornerstone of this organization's objectives, and of the criminal justice system, is the Confrontation Clause of the Sixth Amendment. The NACDL is very concerned about any decision which would undermine or restrict the scope of this constitutional guarantee, as would the adoption of the position taken by the Petitioners and the court below in the instant case.

The Amicus Curiae Committee of the NACDL has determined that the issues involved in this case are of such importance to criminal defense lawyers and their clients throughout the nation that the NACDL should offer its assistance to this Court. Without necessarily endorsing our positions, all parties have consented to the filing of this brief pursuant to Rule 36.2 of the Rules of this Court: Gary E. Bair, Assistant

Attorneys General, on behalf of Petitioners and Maria Cristina Gutierrez, on behalf of Respondent. Letters of consent are on file with the Clerk of this Court.

SUMMARY OF ARGUMENT

Historically there is no question but that the Confrontation Clause of the Sixth Amendment has required a face to face confrontation between the accusing witness and the person accused. Coy v. Iowa, 108 S. Ct. 2798 (1988)

The court should not carve out an exception for child sex abuse cases. Research shows that children do make false allegations, in epidemic proportions. Graham, "Indicia of Reliability and Face to Face Confrontation: Emerging Issues in Child Sexual Abuse Prosecutions," 40 U.MiamiL.R. 19, 5, FN 79 Children do not make false allegations because they are lying,(that

would be the exception rather than the norm) but rather because they are prodded, coached and encouraged to do so by bumbling interviewers. Schetkey & Boverman, "Faulty Assessment of Child Sexual Abuse: Legal and Emotional Sequel," presented at the Annual Meeting of the American Acadamy of Psychiatry and the Law, October 10, 1985

Allowing children to testify via closed circuit television makes it too easy for a false allegation to persist. The Confrontation Clause of the Sixth Amendment was intended to place pressure on witnesses, so that jurors could best ferret out false allegations. To allow otherwise means that there will be an increase in unjust convictions in this sensitive area of law. The children will then have to bear a heavy burden of have unjustly convicted an innocent person, frequently a relative or

friend. This does not at all protect children.

ARGUMENT

ALLOWING CHILDREN TO TESTIFY VIA TELEVISION DOES NOT PROTECT CHILDREN BUT FACILITATES AND REWARDS THE FALSE TESTIMONY. SHOULD A CONVICTION RESULT, THE CHILD BEARS THE HEAVY BURDEN OF BEING RESPONSIBLE FOR AN UNJUST CONVICTION.

A. AN HISTORICAL ANALYSIS OF THE CONFRONTATION CLAUSE.

A case involving allegations of child sexual abuse raises in us all deep emotions, emotions that can cloud a fair analysis of important legal issues present in the case. There is, thus, a need to precede an application of case facts to modern-day law with an in depth report of the historical background of the fundamental right to confrontation.

Beginning at the beginning of Western culture, the Roman government recognized the importance of a face to face confrontation

with one's accuser. Defending one convicted of a crime without a fair trial, the disciple Paul argued to the Roman governor that, "It is not the manner of the Romans to deliver any man up to die before the accused has met his accusers face to face and has been given a chance to defend himself against the charges." The Holy Bible, Acts 25:16. The Western world has continued in the tradition of trials rooted in face to face confrontation between accuser and accused. We have borrowed the English word "confrontation" from ancient Latin words embodying the spirit of the words of Paul. "Con" comes from the Latin word "com" which means coming together. "Fron" comes from the Latin word "frons" which means forehead. Webster, Webster's New Twentieth Century Dictionary Unabridged, Second Edition, at page 383, Simon Schuster (1983). See, Coy

v Iowa, 108 S. Ct. 2798 (1988).

The most ancient method of trial in Europe was the "Trial by Ordeal." Religious in origin, the accused was put through a variety of tortures to determine guilt or innocence. For example, an accused was made to carry a hot iron for a distance of ten (10) feet. The hand was bandaged and kept under seal for three (3) days. If clean, the person was clean/innocent. If burned, the accused was unclean/guilty. The Ordeal had nothing to do with the confrontation of witnesses or evidence. It was witness, evidence, jury, and judge all rolled into one expeditious, if unfair, package. Plunckett, A Concise History of the Common Law, 5th Edition, (1929).

The Normans replaced the Trial by Ordeal with something called a "Wager of Law." Still essentially an Ordeal, it allowed

those accused some ability to call witnesses, who were also the jurors, in their behalf. Plunckett at 113, 427.

During the period of Tudor-Stuart absolutism in England, years 1485 to 1637, what we now know as a jury trial developed from the Norman concept of Wager of Law. Knappen, M.M., Constitutional and Legal History of England, Harcort, Brace and Co., (1942). At first the jurors were the witnesses to an alleged crime. They met in secrecy and decided the true nature of the facts in the case, each swearing under oath that the person was innocent/clean or guilty/unclean. Plunckett at 429, 433.

In the infamous Court of Star Chambers, with its ceiling painted with stars on a field of blue to resemble the evening sky, the King hauled citizens before Judges he appointed. Conviction upon conviction was

obtained through the use of Affidavits, sworn and unsworn. Keir, David, The Constitutional History of Modern Britain, D. Van Norstrand Co., Inc. (1948). Sir Walter Raleigh, popular with the people, but not with their King, was convicted of treason after trial by affidavits. Raleigh neither saw nor spoke to his accusers in the courtroom. The Affidavits were unimpeachable. Graham, "The Right of Confrontation and the Hearsay Rule: Sir Walter Raleigh Loses Another," 8 Crim.L.Bull. 99 (1972).

In 1536 with the enactment of a hallmark of freedom, Elizabeth's statute, finally came a law which in some cases compelled the attendance of witnesses at trials. Beginning in 1615 Sir Edward Coke, Chief Justice of the Court of Common Pleas tried valiantly, and failed, to carry forward the

notion that witnesses must attend trials and face those they accuse. Coke argued strenuously that there must be a separation of witnesses from jurors, allowing the jurors to judge the credibility of the witnesses. Plunckett at 435; Knappen at 400.

Distressed with the lack of justice in the English court systems, legal scholars such as Sir Edward Coke, looked to old Roman civil law to support, among other things, the "novel" concept of confrontation of witnesses. Oliver Wendell Holmes, The Common Law, (1881); Marcham, Frederick G., A Constitutional History of Modern England, 1485 to The Present, Harper and Bros. (1960). Despite the public outcry at the conviction of Sir Walter Raleigh, changes in convictions by ex parte depositions and affidavits, sworn or otherwise, were slow to

come. But towards the end of the seventeenth century, fewer courts accepted such hearsay statements, and the once widespread use of ex parte affidavits gradually fell from favor. Wigmore, J., Wigmore on Evidence, Volume 5, Section 1395 (J. Chadbourn rev. 1974).

The rule that what one person heard another say, hearsay, would not be allowed in a court of law was largely the result of the English experience that trial by affidavits and ex parte depositions failed to protect one against untrustworthiness. Long v State, 742 S.W.2d 302, 306 (Ct. Crim. App. Tex. 1987) (en banc). Under no circumstances should a trial be conducted so as to have the even the appearance of a star chamber proceeding. Dutton v State, 91 A.417, 422 (1914). The English gradually came to realize, as had the Romans before

them, that:

> "Many possible deficiencies, suppressions, sources of error and untrustworthiness, which lie underneath bare untested assertion of a witness, may be best brought to light and exposed by the test of cross-examination. Long v State at 306, citing Wigmore, Wigmore on Evidence, 3rd ed., vol. 5, p. 3-11 (Boston: Little, Brown and Co., 1949).

The right of a face to face confrontation with an accusing witness developed alongside the concept of hearsay, from the realization that the one necessarily accompanied the other. William Shakespeare articulated this concept well when Richard the Second spoke: "Then call them to our presence -- face to face, and frowning brow to brow, ourselves will hear the accuser and the accused freely speak . . ." Shakespeare, Richard II, Act 1, scene 1.

From Saint Paul pleading a man's case to a Roman governor in biblical times, to Shakespeare's Richard II, circles the notion

of face to face confrontation, forehead to forehead, of witness and accused in a criminal trial.

The first immigrants to America began their colonization at roughly the same time as the English common law began to leave behind medieval Trials by Ordeal and adopt more humane and logical methods of trial, which included a rule of confrontation of witnesses and its counterpart, the rule against the use hearsay. Indeed, one of the stated goals of American colonists was to mitigate the severity of the English common law, particularly to mitigate the severity of criminal law. Holden v Hardy, 169 U.S. 366, 386 (1898).

Still stinging from abuses at the hand of the crown, the colonists worked hard to protect and preserve in America the privileges recently granted an accused in

England.

Even before the American revolution, the Constitutions of many of the colonies reflected a right of confrontation in a criminal case. Heller, The Sixth Amendment to the Constitution of the United States: A Study in Constitutional Development, Greenwood Press (1969).

The notable exception was the Puritan colony in Massachusetts which held lawyers and lawyering in low regard. So it was that in the Salem witchcraft trials in 1692 many of the new safeguards for one accused of a crime did not apply. "Witches" were not presumed innocent, could not employ counsel even if they could afford it, and a jury's verdict was subject to impeachment. The one right inviolate even in the Salem witchcraft trials was the right of confrontation. All of the children under the "spell of the

witches" were required to come to court and face to face with the witch, describe the sorcery. Starkley, M. The Devil in Massachusetts, A.A. Knopf (1949).

(As an aside, the parallels between the hysterical outbreak of allegations of witchcraft in Salem, Massachusetts and the wave of child sexual abuse allegations and trials are haunting. Though separated by nearly three hundred (300) years, the children claiming to be under the spell of witchcraft and children claiming sexual abuse in day care facilities say frighteningly similar things. The sordid allegations by the children against the witches and The Puritan Society's defense of the Salem children as incapable of lying about sorcery track step by step the sordid allegations by today's children against child care givers, and defenses of these

children as incapable of lying about sexual abuse. Compare, Starkley, M., The Devil in Massachusetts with Berliner and Barbieri, "The Testimony of the Child Victim of Sexual Assault," Journal of Social Issues, Vol 40 (1984) with Summit, Roland, "Child Accomodation Syndrome," 7 Child Abuse & Neglect 177 (1983), and with Victor Hugo's Les Miserables, (1862). "No one ever keeps a secret so well as a child.")

The United States Constitution, though passed without a right of confrontation, achieved ratification only after several states were assured that a Bill of Rights, which would include a right of confrontation, would soon follow. Levy, Constitutional Opinions: Aspects of the Bill of Rights, Oxford University Press (1986). Even so, many antifederalists vehemently opposed the ratification of a

Constitution which did not guaranty to a man, held to answer for a crime, the right to confront the witnesses against him. Kammen, The Origins of the American Constitution: A Documentary History, Viking Penguin, Inc. at 315-316 (1986) cited in Long v State at 307.

True to their word that the right to confrontation would be explicitly protected, authors of the constitution were quick to fashion the Bill of Rights from several state constitutions. James Madison introduced the Bill of Rights in 1789. It was adopted by Congress the same year and ratified in 1791. The Texas Court of Criminal Appeals reflected that:

> "Almost passively the right of confrontation found its way into every document that could be considered the forerunner of the Constitution. The necessity of its inclusion into the Constitution was apparently viewed to be simply absolute and so it was that confrontation became one of the

> guarantees accorded accused individuals. Its incorporation was apparently a foregone conclusion that generated no serious debate among the delegates simply because the right to confront one's accusers is one of the fundamental guarantees of life and liberty." Long v State at 308.

Beginning with Mattox v United States, 156 U.S. 237 (1895), the United States Supreme Court has examined the Confrontation Clause, allowing exceptions only upon a strong showing of the necessity for such hearsay, combined with the probability of its trustworthiness. In Mattox the court soundly approved the historical purposes of the right of face to face confrontation to:

> prevent depositions or ex parte affidavits, such as were sometimes admitted in civil cases, being used against the prisoner in lieu of a personal examination and cross-examination of the witness, in which the accused has an opportunity not only of testing the recollection and sifting the conscience of the witness, but of compelling him to stand face to face with the jury in order that they may look at him, and gauge by his demeanor upon the stand

> and the manner in which he gives his testimony whether he is worthy of belief. Mattox at 242-243.

The Supreme Court's commitment to face to face confrontation of witnesses is exemplified in Pointer v Texas, 380 U.S. 400 (1965), where the court reversed a defendant's conviction where it was obtained with the use of a transcript of a trial at which the defendant was not represented by counsel (which meant that no effective confrontation had occurred.) The Court held that the Sixth Amendment right of an accused to confront witnesses against him was a fundamental right made obligatory on the State of Texas by the Fourteenth Amendment. Pointer v Texas at 403.

That the right of confrontation is indelibly linked to the right to cross-examination is inarguable. The right to a physical, face-to-face, confrontation has

never been ignored by the Court. Delaware v Fensterer, 474 U.S. 15 (1985). In this opinion the court articulated clearly that the:

> Confrontation Clause cases fall into two broad categories: cases involving the admission of out-of-court statements and cases involving restrictions imposed by the trial court on the scope of cross-examination. The first category reflects the Court's long-standing recognition that the literal right to "confront" the witness at the time of trial . . . forms the core of the values furthered by the Confrontation Clause.

A departure from face-to-face confrontation has received judicial approval in two circumstances. Long v Texas at 315. In the first circumstance, the departure stems from an historically well-recognized exception to the hearsay rule, such as a dying declaration, excited utterances, or business records. Nevada Revised Statutes 51.335, NRS 51.095, NRS 51.285. In the second

circumstance the departure will be condoned **ONLY** in the face of manifest public necessity, and then only if the testimony is trustworthy. Ohio v Roberts, 448 U.S. 56 (1980); California v Green, 399 U.S. 149 (1970).

Most recently, in the context of a child sexual abuse case, the United States Supreme Court renewed a firm commitment to the right of an accused to a face-to-face confrontation with the witnesses against him, affirming that:

> We have never doubted, therefore, that the Confrontation Clause guarantees the defendant a face-to-face meeting with witnesses appearing before the trier of fact. Coy v Iowa, at 2800.

B. CHILDREN ADOPT AS THEIR TRUTH THE ADULTS' PRECONCEIVED OPINION THAT ABUSE HAS OCCURRED, WHICH LEADS TO MANY FALSE ALLEGATIONS.

As a society, we have come a long way from the adult-oriented Puritan society which

executed twenty-some women and two dogs for witchcraft. See, Starkley, M., The Devil in Massachusetts. America is a society that dotes on children and strives to protect them from harm. Businesses capitalize on this fact. MacDonalds hamburger chain certainly does not market its product. It markets smiling, beautiful children. The MacDonalds message: use our product and you too will have smiling, beautiful children.

The goal of protection of children from all forms of abuse, whether it be physical or psychological, hunger, being homeless, or illiterate, is laudable.

Where abuse exists, and without question it does, in many forms, including sexual abuse, it is a tragedy.

America is awash in a sea of hysteria regarding child sexual abuse, just as the Puritans were hysterical in their belief

that children were under the spell of witches. Graham, "Indicia of Reliability and Face to Face Confrontation: Emerging Issues in Child Sexual Abuse Prosecutions," 40 U.MiamiL.R. 19, 54, FN 79. This too is a tragedy. In divorce cases child sexual abuse has replaced adultery as the "allegation of choice" to achieve one's goals. Diane H. Schetky, Emerging Issues in Child Psychiatry and the Law, Brunner/Mazel, Inc, 1985.

Many iron-clad prosecution "day care" abuse cases have fallen apart, such as People v McMartin, Superior Court for Los Angeles County, Case No. A750900; See, "The Sex Abuse Puzzle," Newsweek, November 13, 1989; the Bentz case from Jordan, Minnesota -- See, FN 12, Note, "The Testimony of Child Victims in Sex Abuse Prosecutions: Two Legislative Innovations," 98 Harv.L.Rev.

806, 807 (1985); State v Babayan, 106 Nev. (Ad. Op. 28) (February, 1990).

Many claim that hysteria cannot explain the increasing numbers of such allegations, because "kids don't lie about things like that." Berliner & Barbieri, "The Testimony of the Child Victim of Sexual Assault," 40 J. Soc. Issues, no. 2 at 125, 127 (1984).

This argument leaves unexplored many other avenues and options which explain a false allegation in terms other than a lie. Children interviewed by adults who believe that abuse has in fact occurred, learn about sex and sex abuse from the interviewer. The adult in effect, contaminates the child with the adult's preconceived opinions as to what happened. The adult provides the child through questions with knowledge of all of the terminology needed. Schetky, Diane, M.D., and Boverman, Harold, M.D., "Faulty

Assessment of Child Sexual Abuse: Legal and Emotional Sequel," presented at the Annuual Meeting of the American Academy of Psychiatry and the Law, Albuquerque, New Mexico, October 10, 1985.

Children in school, at church and via television are being bombarded with programs aimed at teaching children of the dangers of abuse. Footnotes 94 and 95 of Note, "The Testimony of Child Victims in Sex Abuse Prosecutions: Two Legislative Innovations," 98 Harv.L.Rev. 806, 820 FN 94 and 95 (1985); at 820 describe programs by Kermit the Frog, the Illusion Theatre, and Spider-Man intended to protect children from sex abuse. They also give young children quite an education in sex abuse.

Children are easy targets for bumbling interviewers whose "agenda" that abuse has occurred becomes the child's tale. Why?

Children are accessible targets for a number of reasons. They have been conditioned to comply with authority; they are in subordinate positions and are fearful of threats; they are susceptible to bribes and the promise of reward. In addition, children are often naive with regard to social norms and values . . . MacFarlane, Sexual Abuse of Children, in the Victimization of Women, 86, 88 (1978).

In State v Ryan, 103 Wash. 2d 140, 691 P.2d 197 (1984), the court noted that:

> both mothers had been told of the strong likelihood that the defendant had committed indecent liberties upon their children before the mothers questioned their children. They were arguably predisposed to confirm what they had been told. Their relationship to their children is understandably of a character which makes their objectivity questionable.

Children want to please adults, or anyone they view as an adult authority figure. Thus they are quick to pick up cues from the

adult that tell the child the "correct" answer. Children are susceptible to suggestion, to rewards; they sometimes have difficulty separating fantasy from reality. A.D. Yarney, The Psychology of Eyewitness Testimony, 204 (1979); Libai, "The Protection of the Child Victim of a Sexual Offense in the Criminal Justice System," 15 WayneL.Rev. 976, 977, 1003 (1969).

Children have no understanding of the serious consequences of the charges they make. Indeed, they perceive truth as the answer expected by an adult authority figure. J. Piaget, The Construction of Reality in the Child, (Routledge trans. 1970); J. Piaget, The Moral Judgment of the Child, (M. Gabain trans. 1950); See, Wilson v United States, 271 F.2d 492, (D.C. 1959); (citing, Guttmacher & Weihofen, Psychiatry and the Law, 374, (1952)).

A child simply adopts the adults' perception that abuse has occurred as her/his own "truth," when the reality may be that there was no abuse. Adults encourage, coach and reward a child to continue.

In People v Martin, 380 Ill. 328, 44 N.E.2d 49 (1942), a child twice confronted the accused and said that he was not her abuser. When police, the prosecutor, and the child's mother told her that he was the abuser, the child quickly caved in and said that he was. The child was not lying in the adult sense of the word, the child merely adopted as her truth what the adult authority figures believed to be true.

So it is then, that innocent adults are swept up in this climate of sex abuse hysteria, falsely accused by children. The children are victims, not of abuse but of

coaching, suggestion, and an unintended education in sex abuse at the hands of interviewers. See, Coy v Iowa, at 2802.

Petitioner argues that if child witnesses must face the one they accuse, that the guilty will go free. In 1603 Sir Walter Raleigh plead for confrontation with an absent witness and met a similar argument. He plead:

> The proof of the Common Law is by witness and jury; let Cobham be here, let him speak it. Call my accuser before my face, and I gave done.
>
> This demand was sarcastically countered by Justice Warburton who, arguing much like Petitioner herein answered:
>
> I marvel, Sir Walter, that you being of such experience and wit should stand on this point; for so many horse-stealers may escape, if they may not be condemned without witnesses. 2 Howell's State Trials, 15-16, 18 (1816).

Often these child sexual abuse cases are not all they're cracked up to be. What may on the surface appear to be a clear case of

child abuse, turns out not to be at all. Many cases cannot withstand close scrutiny.

In child sexual abuse cases, just like in all other criminal cases, the ability to confront one's accusers -- face to face -- regardless of their ages is of utmost importance. It has been for centuries. Pollitt, "The Right of Confrontation: Its History and Modern Dress," 8 J.Pub.L. 381 (1959). The NACDL is deeply concerned that the court not allow one-way closed circuit television to pass for confrontation of a witness.

C. THERE ARE THE TECHNICAL PROBLEMS WITH TELEWITNESSES.

In Coy v Iowa, supra, the concurring opinion by Justice O'Connor suggests that children may, under some circumstances be allowed to testify via television out of the presence of the citizen accused. Id. at 2804, 2805.

Setting aside for a moment the violation of the Confrontation Clause inherent in such a scheme, there are technical difficulties with the "telewitness trials."

The equipment fails. The Joint Appendix is replete with references to equipment failures, so that the accused could not hear the child, could not communicate with counsel, the court reporter could not hear over the phone to transcribe literally. (JA 81, 84, 86, 88, 137, 139, 162, 174, 186, 187, 222) There were many times when the accused could not assist in cross examination, because she could not hear the child or could not reach her attorney on the telephone.

D. THE CAMERA BECOMES THE EYES OF OF THE JURY, WHICH DEPRIVES THE ACCUSED OF DEMEANOR EVIDENCE VITAL TO THE CONFRONTATION CLAUSE.

Telewitness trials wreak havoc with the Confrontation Clause in ways peculiar to

video cameras. The camera acts as a filter for the jury, focusing all twelve's attention on the same spot. With live testimony, one juror might watch the witnesses face, one wringing hands, still another may turn to see who the child looks to each time before an answer is given. No more. The camera selects the angle, which can make a witness look small and defenseless, or big and mean. Graham, "Indicia of Reliability and Face to Face Confrontation: Emerging Issues in Child Sexual Abuse Prosecutions," 40 U.MiamiL.Rev. 19, 74-75.

> Lighting can alter demeanor in a number of ways . . . Variations in lens or angle, may result in failure to convey subtle nuances, including changes in witness demeanor . . .[A]nd off-camera evidence is necessarily excluded while the focus is on another part of their body . . .Thus, such use of closed circuit television may affect the jurors' impressions of the witness' demeanor and credibility . . . Also it is quite conceivable that the credibility of a witness whose testimony

> is presented via closed-circuit television may be enhanced by the phenomenon called status-conferral; it is recognized that the media bestows prestige and enhances the authority of an individual by legitimizing his status . . . Such considerations are of particular importance when, as here, the demeanor and credibility of the witness are crucial to the state's case. Citing, Hochheiser v Superior Court, 161 Cal. App.3d 777, 208 Cal. Rptr. 273 (1984); Accord, United States v Benfield, 593 F.2d 815 (8th Cir. 1979).

The setting, or choice of the room used for the videotaping, (sometimes referred to as PVT's, Prerecorded Videotaped Trials) also plays an important part of the nonverbal message given the jury. It is a different message from other witnesses who testify in compliance with the Confrontation Clause. G. Millerson, The Technique of Lighting for Television and Motion Pictures, at 175, 178 (1972). One commentator suggests that:

> To demonstrate the problem, contrast a witness taped in a wood-paneled setting under soft lights with another taped in a brightly lit witness box.

> While these differences arise unintentionally under the PVTs piecemeal method of testimony taking, the possibility of intentional abuse to sway jurors is very real. See, FN 61, The Criminal Videotape Trial: Serious Constitutional Questions, 55 Ore.L.R. at 576 (1976).

Jurors who have decided Prerecorded Videotape Trials (PVTs) have expressed the feeling that the "human element" of a trial was missing. A survey of PVT jurors asked if they would use a trialavision if faced with criminal prosecution suggests that television, essentially an entertainment medium, is a medium not suited for trials. Doret, "Trial by Videotape--Can Justice Be Seen To Be Done?," 47 Temp.L.Q.228 (1974).

The presentation of the telewitness, then, inadequately transmits demeanor evidence, which has historically been an important facet of the Confrontation Clause. Douglas v Alabama, 380 U.S. 415, 418-419 (1965); Note, "The Criminal Videotape Trial: Serious

Constitutional Questions," 55 Ore.L.R.567 (1976); J. Ruesch & W. Kees, Nonverbal Communication: Notes on the Visual Perception of Human Relations, 39 (1956).

The demeanor of a witness has traditionally been of great import in providing the jury with nonverbal evidence. Mattox v United States, 156 U.S. 237, 242 (1895); 3A J. Wigmore, Evidence, Section 946 (Chadbourn rev. 1970); C. McCormick, The Law of Evidence, Section 245 (2d ed. 1972).

At least one court felt that "special TV treatment" afforded the child as complaining witness may create a prejudice against the Defendant similar to that found when a Defendant appears in restraints in front of the jury. Hochheiser v Superior Court, supra at 788, 208 Cal. Rptr. at 279.

Does the use of television not also imply to the child, or "cue" the child, that s/he

is there to entertain, like Saturday morning cartoons, rather than to perform the solemn duty of a witness? Does the procedure "cue" the child that the court, too, believes in the truth of abuse, further contaminating the child's tender mind? See, Schetky, Diane, M.D., and Boverman, Harold, M.D., "Faulty Assessment of Child Sexual Abuse: Legal and Emotional Sequel," presented at the Annual Meeting of the American Academy of Psychiatry and the Law. Albuquerque, New Mexico, October 10, 1985, infra.

E. THERE WAS AN INSUFFICIENT SHOWING OF A COMPELLING NEED TO USE TELEVISION.

At least some of the children in the case at bar showed signs of recognizing that they were on stage, of being a little TOO comfortable with the setting. Jessie frequently questioned the questioner asking:

> "You know what?"
> "Do you know what he did to me?" JA at 204.

This child then volunteered without a hint of embarrassment that:

> In my private places. I've got a itchy. I've got itchy right here. Sometimes I itch right there. JA at 230.

Justin was quite a precocious child who seemed to be almost sparring with the court and counsel when each questioned him. This lad, too, seemed a little TOO at ease in the telesetting. For example, consider the following quotations:

> BY THE COURT:
>
> Q. And what is his name:
> A. I already told you his name? (Sic)
> Q. Elliot?
> A. Yeah.
> Q. I wasn't sure. I'm sorry. JA at 245.

The court is apologizing to the child for the formation of his question!!

Later, under cross examination the child again takes control:

> A. Yeah. Why are those golden bracelets around your arm? JA at 265.

Given this factual scenario, it is not surprising that the high court of Maryland considered the showing by the State insufficient to reach the high threshold required by that case (Coy) before Section 9-102 (allowing children to testify on TV under certain circumstances) may be invoked. (Pet. App. at 3a) The lower court found only that:

> "the testimony of each of these children **in a courtroom setting** will [result] in each child suffering serious emotional distress and such that each of these children cannot reasonably communicate . . ." (Pet. App. at 4a) (Emphasis added.)

While the court articulated a policy of the protection of children, the harm from which he wishes to protect the children is not at all clear from his opinion. Experts testified that:

> Brian could not testify in an open courtroom such as this. JA at 22.
>
> I believe it would also be difficult for her because of her age to sit in front of a group of strangers whether they be Mrs. Craig or any other person and discuss the allegations. JA at 39.

> I believe that Justin would be, once again, he would have great difficulty talking in front of people . . . JA at 41.
>
> I think it would be very -- it would impair his ability to communicate. Id.

Assuming that this Court entertains notions of allowing children to accuse outside the presence of Mrs. Craig, it must never allow this to happen because the children fear an open courtroom. Any exception to the Confrontation Clause absolutely must be tailored as narrowly as possible, to fit the articulated need. There need be no blitzkrieg on the Confrontation Clause if the child's fear is of strangers or a public courtroom. Extreme care must be taken when searching for a correct balance between the policies protecting a child witness and the right of

an accused to a fair trial. See, Globe Newspaper Co. v Superior Court, 457 U.S. 596 (1982).

If a child fears judicial robes, address that concern. If the child fears a large room, address that concern. If a child fears strangers in public, address that concern. Changes in all of these areas have do not require an exception to the rule of face to face confrontation between witness and accused.

> The rights of confrontation and cross-examination have ancient roots. They find expression in the Sixth Amendment which provides that in all criminal cases the accused shall enjoy the right 'to be confronted with the witnesses against him.' This Court has been zealous to protect these rights from erosion. Greene v McElroy, 360 U.S. 474, 496-497 (1959).

With this case, the court should continue to zealously safeguard the Constitution. It should not hack out yet another exception to the Confrontation Clause, further eroding

what is left of it. There is a marked discrepancy between the "experts' testimony of children so terrified they curl up in fetal positions when they discuss these allegations (JA at 24) and the reality that in the courtroom (albeit via television) they showed little to no fear as witnesses. Indeed their precocious bantering, proves that in this case the use of television failed to fulfill an important constitutional policy. It did not insure that the children were impressed with the seriousness of the matter. California v Green, 399 U.S. 149,at 158 (1970). The lack of face to face confrontation casts doubt on the reliability of the testimony, which is of course why our country insisted on a right to face to face confrontation in the Bill of Rights in the first place. Mattox v United States, infra.

This case illustrates plainly that though there is a need for society to protect children, allowing them to testify in violation of the Confrontation Clause is not suited to addressing that need. Instead it encourages too cavalier an attitude on the part of the children who condemn a person presumed innocent. It deprives the jury of valued demeanor evidence by substituting the camera's lens for the jurors' lenses. It erodes the presumption of innocence.

The Constitution was carefully crafted by wise men, too familiar with trials which protected the accusers at the expense of convicting innocent people. The Court should not erase the carefully measured words of the founding fathers based upon this record in connection with child abuse cases.

F. CHILDREN WHO FALSELY ACCUSE ARE BEST PROTECTED BY A REQUIREMENT OF FACE TO FACE CONFRONTATION WHICH WILL DISCOURAGE SUCH TESTIMONY AND ALLOWS JURORS TO BETTER IDENTIFY IT.

The policy of protecting children is worthy. Children who make false allegations for the reasons explained herein are decidedly NOT protected by being allowed to testify via television. The suggested removal from a face to face confrontation with the person the child accuses makes it easier to persist in a false allegation. If a conviction should result, then the child is left with a lifelong burden of having convicted an innocent man or woman, who in many cases may be a close relative or friend.

The face to face confrontation requirement is meant to place the witness under pressure. The pressure allows the jury to sift the conscience of the witness. Mattox

v United States, infra. It is harder to accuse a person directly, and it should be. It impresses the witness with the seriousness of the matter at hand. Lee v Illinois, 476 U.S. 530 (1986). This practice should remain and will protect many children being responsible for a false conviction.

It may be that some legitimate cases of child abuse will go unprosecuted. This side affect of an important constitutional maxim was not unforseen by its drafters. Graham, "The Right of Confrontation and the Hearsay Rule: Sir Walter Raleigh Loses Another One," at 128, FN 144.

It is far better that all children, those making legitimate allegations as well as those making false allegations, be protected by the court as much as possible within the confines of the constitution. This can only

be done by continuing to require a face to face confrontation between child and the accused.

CONCLUSION

Before any serious thought is given to removing the child, or the accused, from the courtroom, much less drastic measures must be tried. If they sufficiently protect the children, then the judicial system need go no further. This Court should therefore affirm the decision of the Court of Appeals of Maryland. (Pet. App. 3a)

Respectfully submitted,

*MARIA CRISTINA GUTIERREZ, ESQ.
1007 NO. CALVERT STREET
BALTIMORE, MARYLAND 21202
(301-539-6500)

ANNABELLE WHITING HALL
440 HILL STREET
RENO, NEVADA 89501
(702-329-6770)

For Amicus Curiae
National Association of
Criminal Defense Lawyers
*Counsel of Record
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